

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Revision of the Commission's Rules to Ensure) CC Docket No. 94-102
Compatibility with Enhanced 911 Emergency)
Calling Systems)

To: The Commission

PETITION FOR RECONSIDERATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby petitions the Commission for reconsideration of its *Memorandum Opinion and Order*, CC Docket No. 94-102, FCC 97-402 (Dec. 23, 1997), 63 Fed. Reg. 2631 (Jan. 16, 1998) ("*Reconsideration Order*"). In the *Reconsideration Order*, the Commission declined to supersede state law regarding the liability of CMRS providers when providing E-911 service.¹ As a result, a provider's liability depends on the terms and conditions in its contracts with subscribers and on laws that vary widely from state to state. Accordingly, BellSouth requests that the Commission, on reconsideration, permit CMRS providers to file FCC tariffs containing the terms and conditions governing the provision of E-911 service to subscribers and non-subscribers alike. The Commission should also clarify that it will not require wireless carriers to provide E-911 until states pass legislation limiting the liability associated with the provision of such service.

BACKGROUND

In the underlying *Report and Order* in this proceeding, the Commission imposed strict compliance requirements on commercial mobile radio service ("CMRS") carriers to ensure

¹ See *Reconsideration Order* at ¶ 137.

compatibility with E-911 emergency calling systems.² Specifically, CMRS carriers are subject to a federal requirement to forward E-911 calls placed from any mobile handset in their coverage area to local Public Safety Answering Points (“PSAPs”), regardless of whether the caller is a roamer with whom another carrier has privity or the owner of a CMRS telephone who is no one’s customer.³ In response to comments that the Commission must limit the liability of CMRS carriers associated with the provision of E-911 service, the Commission concluded that CMRS carriers can protect themselves from liability by contractually indemnifying themselves via their subscriber service contracts in the same way that local exchange carriers (“LECs”) indemnify themselves by tariff.⁴

Several parties sought reconsideration of the Commission’s decision not to immunize wireless carriers from liability for E-911 calls, arguing on reconsideration that if such carriers “are required to provide access to 911 for all callers, including those with whom they do not have any contractual relationship, they cannot contractually insulate themselves from liability when non-subscribers use their systems.”⁵ The Commission’s *Reconsideration Order* recognized this problem, stating:

We recognize . . . petitioners’ claim that they cannot contractually insulate themselves from liability when non-subscribers use their systems. Because covered carriers are required to transmit 911 calls from *all* handsets regardless of subscription, we agree with SBMS that *it would appear reasonable for a carrier to attempt to make the use of its network by a non-subscriber subject to the carrier’s terms and conditions for liability.*⁶

² *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 18676 (1996) (“*R&O*”).

³ *See id.* at 18695.

⁴ *Id.* at 18727.

⁵ *Reconsideration Order* at ¶ 132 (citing BellSouth Petition at 9; SBMS Petition at 8-11; AT&T Petition at 7; Omnipoint Petition at 6; Ameritech Petition at 11).

⁶ *Reconsideration Order* at ¶ 140 (emphasis added) (footnotes omitted).

Nevertheless, the Commission failed to specify what reasonable means might be used by carriers to insulate themselves from liability given the lack of privity of contract with non-subscribers. Accordingly, BellSouth seeks reconsideration and/or clarification of the Commission's decision not to specify what reasonable means might be available to carriers.

DISCUSSION

I. GIVEN THE FEDERAL MANDATE TO PROVIDE E-911 TO NON-SUBSCRIBERS, CARRIERS SHOULD BE INSULATED FROM LIABILITY NATIONWIDE IF THEY CHOOSE TO FILE LIMITED FEDERAL TARIFFS

The solution to the non-subscriber issue is simple, and indeed has been adopted by the Commission on reconsideration in the mandatory detariffing proceeding for interstate, interexchange carriers ("IXCs"): the Commission should permit CMRS carriers to file limited tariffs governing the terms of service solely to callers with whom the carriers have no prior direct contractual relationship. Such tariffs would establish terms and conditions, including limitations on liability and choice-of-law, for the provision of E-911 service where there is no existing privity of contract, and would in no way be usable for diminishing competition. It follows that if the FCC has authority to require wireless carriers to implement E-911 services, the Commission has the authority to offer such carriers insulation from liability by allowing the filing of federal tariffs governing E-911 terms and conditions.

In its *Interstate, Interexchange* service proceeding, the Commission acknowledged the legitimate need for the use of tariffs, even in services that are otherwise detariffed, when carriers provide service to customers with whom they have no established contractual relationship.⁷ There,

⁷ See *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act, as amended*, CC Docket No. 96-61, *Order on Reconsideration*, FCC 97-293 (rel. Aug. 20, 1997). "Permissive detariffing" refers to a policy of allowing, but not requiring, carriers to file tariffs, whereas "complete detariffing" does not permit

the Commission established an exception to its general policy of mandatory detariffing for particular cases where there has been no opportunity to establish binding contractual terms with a non-subscriber. Specifically, the Commission examined instances where an IXC is unable to distinguish between callers with whom it has subscriber contracts, and so-called “casual” callers whom it does not. In response to contentions that in the absence of at least limited tariffs “carriers would need to develop costly and burdensome mechanisms to ensure the establishment of a legal relationship with casual callers . . . and to bind [them] to the terms and conditions of the service, including limitations on liability,”⁸ the Commission changed its mandatory detariffing policy and decided to permit the filing of limited tariffs governing the terms of service to such casual callers with whom the carrier has no privity of contract.⁹ The Commission agreed to permit such permissive tariffs because it was persuaded that the establishment of an enforceable contract with casual callers could not otherwise be implemented.¹⁰

Although the Commission currently forbears from permitting tariffs of interstate service offered by CMRS providers,¹¹ the Commission could apply the same limited exception from tariff forbearance for wireless carriers in the E-911 context. The Commission has already acknowledged the need to establish a means by which nondominant IXCs could set terms and conditions for callers with whom they have no contract and to allow permissive detariffing in those instances. The Commission should do the same for wireless carriers in the E-911 context.¹² Accordingly, the

carriers to file any tariffs. *Id.* at n.5.

⁸ *Id.* at ¶ 19.

⁹ *Id.* at ¶ 32.

¹⁰ *Id.*

¹¹ See *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Gen. Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1480 (1994).

¹² In the *Interstate, Interexchange* proceeding, the Commission approved of a second way to establish terms for service to non-subscribers — the use of a recorded preamble before providing

Commission should reconsider its decision not to specify how a covered carrier can attempt to make the use of its network by a non-subscriber subject to its terms and conditions for liability. Allowing carriers to file limited-purpose tariffs is an appropriate solution to the issue of establishing binding terms and conditions for the provision of E-911 by wireless carriers to non-subscribers.

II. THERE ARE SOUND PUBLIC POLICY REASONS FOR ALLOWING THE USE OF TARIFFS TO ESTABLISH TERMS AND CONDITIONS FOR E-911 SERVICE TO SUBSCRIBERS, AS WELL

The Commission should not limit the applicability of E-911 tariffs to non-subscribers. It should allow CMRS providers to use FCC tariffs to establish the terms and conditions for provision of E-911 service to their own subscribers, as well as non-subscribers. The reason for this is simple. CMRS service, including E-911 service, is not necessarily a purely intrastate service provided to customers in their own state of residence utilizing facilities governed by a single state's law. It is a service that is often provided in a multi-state environment, where no single state's law clearly governs any given communication.

A local example illustrates this: a Washington, D.C. resident might place an emergency call from a highway on the Maryland shore of the Potomac River; the call may be handled by a cell site located in Virginia and routed through a switch in Washington, D.C. before being handed to a PSAP in Virginia, based on the cell location. That PSAP then discovers the caller is in Maryland and has to reroute the call to the proper Maryland PSAP.

A determination of which jurisdiction's law, or even which choice-of-law doctrine, governs the carrier's liability presents great difficulties. Allowing the carrier to file a single tariff with the FCC could be used not only to establish any limits on the carrier's liability, but also to establish a

service. While this may be a viable alternative for casual long distance callers, it would clearly be a less than ideal solution in the context of providing emergency communications, where delay can be critical.

framework for determining which laws apply to a given E-911 call. Doing this by tariff will allow the carrier to have uniform terms and conditions governing E-911 calls for subscribers and non-subscribers, and will allow those terms and conditions to be updated to reflect changes in the technology and in state laws without the need for amending the contracts the carrier has with thousands of customers.

III. THE COMMISSION SHOULD NOT REQUIRE WIRELESS CARRIERS TO PROVIDE E-911 UNTIL STATES PASS LEGISLATION LIMITING THE LIABILITY ASSOCIATED WITH THE PROVISION OF SUCH SERVICE

The Commission has recognized the wireless industry's "concern over potential exposure to liability,"¹³ but has questioned its authority to adopt rules insulating wireless providers of E-911 service from liability.¹⁴ According to the Commission,

If the E911 wireless carriers wish to protect themselves from liability for negligence, they may attempt to bind customers to contractual language, require public safety organizations to hold them harmless for liability, as suggested by US West, or, if the liability is caused by the rulings of the Commission, argue that the actions complained of were caused by acts of public authority."¹⁵

As the Commission subsequently recognized, however, carriers cannot insulate themselves contractually with regard to E-911 calls from non-subscribers and, thus, "it would appear reasonable for a carrier to attempt to make use of its network by a non-subscriber subject to the carrier's terms and conditions for liability."¹⁶ The Commission never expounds upon how a carrier could legally limit its liability in such a manner where it has no privity with a non-subscriber.

¹³ *Reconsideration Order* at ¶ 139.

¹⁴ *See, e.g., R&O*, 11 F.C.C.R. at 18728.

¹⁵ *Id.* at 18727 (footnote omitted).

¹⁶ *Reconsideration Order* at ¶ 140.

BellSouth submits that the Commission should amend Section 20.18 to make clear that wireless providers are not obligated to provide E-911 within a state until the state limits the liability of wireless providers regarding the provision of E-911 service. Alternatively, the Commission could clarify that any cost recovery mechanism adopted by a state must contain a limitation of liability for the provision of E-911 service. The Commission has already acknowledged that "resolving cost recovery issues is a prerequisite to E911 deployment."¹⁷ The resolution of liability issues are equally important and must also be a prerequisite to E-911 deployment. Amending Section 20.18 in the above manner will (i) eliminate the Commission's concerns over its ability to limit liability, (ii) alleviate the concerns of the wireless industry regarding increased liability, and (iii) permit each state to limit liability in the manner it deems appropriate.

Respectfully submitted,

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¹⁷ R&O, 11 F.C.C.R. at 18722.

CERTIFICATE OF SERVICE

I, Berta Peters, hereby certify that on this 17th day of February, 1998, copies of the foregoing "Petition for Reconsideration" in CC Docket No. 94-102 were served by hand on the following:

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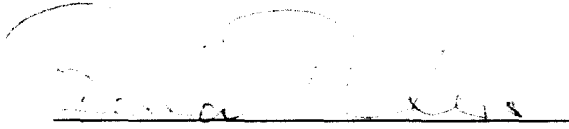
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